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No. 90-641

In the Supreme Court of the United States

OCTOBER TERM, 1990

REGINALD G. ADDISON, ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a Federal Trade Commission cease and desist order may properly forbid parties who have engaged in an unlawful horizontal price-fixing agreement from conspiring to induce or encourage others to engage in similar unlawful price-fixing.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-2a) is not reported. The opinion and order of the Federal Trade Commission (reproduced in part at Pet. App. 3a-12a) are reported at 107 F.T.C. 510.

JURISDICTION

The judgment of the court of appeals was entered on March 16, 1990. Pet. App. 1a-2a. A petition for rehearing was denied on May 23, 1990. Pet. App. 13a. The order of the court of appeals denying the petition for rehearing was vacated by the court on October 2, 1990, Pet. App. 16a-17a, and a new order denying the petition for rehearing was entered on the same date, Pet. App. 18a. The petition for a

writ of certiorari was filed on October 10, 1990. Petitioners have invoked the jurisdiction of this Court under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Superior Court Trial Lawyers Association (SCTLA) is an organization of attorneys registered to accept case assignments in the District of Columbia courts under the District's Criminal Justice Act (CJA), D.C. Code Ann. §§ 11-2601 *et seq.* The individual petitioners were among the leaders of a price-fixing boycott that SCTLA conducted in 1983 to induce the District of Columbia government to increase the rate paid to attorneys for representation of indigent criminal defendants under the CJA. See *FTC* v. *Superior Court Trial Lawyers Association*, 110 S. Ct. 768, 770-772 (1990).

The Federal Trade Commission (FTC) issued a complaint charging that the boycott was an "unfair method of competition" under Section 5 of the FTC Act, 15 U.S.C. 45. After hearings before an administrative law judge, an initial decision was entered dismissing the complaint. On administrative appeal, however, the Commission concluded that petitioners' conduct violated Section 5 of the FTC Act, and entered a cease and desist order against petitioners. See *In re Superior Court Trial Lawyers Ass'n*, 107 F.T.C. 510, 562-605 (1986).

The Commission's order directs petitioners to cease and desist from "entering into, continuing, cooperating in, or carrying out any agreement, understanding, or planned common course of action" to: (a) withhold legal services under any government program providing appointed counsel in an effort to increase the price paid for such services; (b) interfere

with the operations of any court in connection with efforts to increase legal service reimbursement rates; (c) "coerce" any person not to provide legal services, or "discourage" any person from providing legal services, in connection with a price-fixing boycott respecting legal services for indigent defendants; or (d) "[e]ncourage, suggest, advise, or induce respondent [SCTLA], any member of [SCTLA], or any other person to engage in any action prohibited by this Order." Pet. App. 4a-5a.[1]

2. Petitioners sought judicial review of the Commission's order in the United States Court of Appeals for the District of Columbia Circuit. The court of appeals vacated the Commission's decision on the issue of liability and remanded for further consideration of whether petitioners enjoyed market power in the conduct of their boycott. Because the court of appeals vacated the Commission's finding of a violation, it had no occasion to consider petitioners' claim that "the Commission's order is overly broad and not reasonably related to the remedial purposes of the Act." *Superior Court Trial Lawyers Association* v. *FTC*, 856 F.2d 226, 253 (D.C. Cir. 1988), rev'd in part and remanded, 110 S. Ct. 768 (1990).

This Court granted certiorari to review the judgment of the court of appeals, and held that the court

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[1] The order also provides that "nothing in this Order shall prevent respondents from:"

> (1) Exercising rights under the First Amendment to the United States Constitution to petition any government body concerning legislation, rules or procedures; or
>
> (2) Providing information or views in a noncoercive manner to persons engaged in or responsible for the administration of any program to obtain legal services for persons eligible for appointed counsel.

Pet. App. 5a.

of appeals had erred to the extent it had rejected the Commission's finding that petitioners had violated Section 5 of the FTC Act. *FTC* v. *Superior Court Trial Lawyers Association*, 110 S. Ct. at 768. The Court explained that petitioners' "concerted action in refusing to accept further CJA assignments until their fees were increased was * * * a plain violation of the antitrust laws," and was not protected by the First Amendment. *Id.* at 778. Accordingly, this Court reversed the judgment of the court of appeals "insofar as that court held the *per se* rules inapplicable to the lawyers' boycott," and remanded the case to the court of appeals for review of petitioners' "objections to the form of the order entered by the Commission." *Id.* at 782 & n.20.

3. On remand, the court of appeals considered petitioners' objections to the Commission's order based on "the parties' briefs, which were previously filed." Pet. App. 2a. By unpublished order dated March 16, 1990, the court enforced the Commission's order in its entirety. *Id.* at 1a-2a. On April 30, 1990, petitioners filed a petition for rehearing and suggestion of rehearing en banc. On May 23, 1990, the court of appeals denied both requests. *Id.* at 13a-14a.

On August 27, 1990, petitioners moved the court of appeals to vacate and reinstate its May 23 denial of rehearing. Petitioners urged that they had received no notice of that denial and if the May 23 order were not vacated "the time for petitioning for a writ of certiorari would have [already] expired." Motion to Vacate and Reinstate Order on the Basis of Lack of Notice at 2 (D.C. Cir. filed Aug. 27, 1990). The Commission opposed this motion. On October 2, 1990, the court of appeals entered a new order vacating its May 23 order denying rehearing, Pet. App. 16a-17a, and issued a new order dated Oc-

tober 2 denying the petition for rehearing. *Id.* at 18a. In taking that action, the court noted that the court of appeals had "failed to give notice to petitioners or their counsel of the entry" of the May 23 denial of rehearing, and that petitioners did not become aware of that order until August 27, 1990. *Id.* at 16a. The court desired to "ameliorate, as far as it has power to do so, the omission by the office of its Clerk [to give notice to petitioners], without undertaking to gauge the effect, if any, of that action upon the timeliness of any subsequent application to the Supreme Court of the United States for a writ of certiorari." Pet. App. 16a-17a.

ARGUMENT

The court of appeals' unpublished decision establishes no precedent,[2] conflicts with no decision of this Court or of any other court of appeals, and, in any event, does not impose the limitations upon petitioners' expression that they claim to find. Accordingly, this Court's review is not warranted.[3]

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[2] Local Rule 11(c) of the D.C. Circuit provides that "[u]npublished orders or judgments, including explanatory memoranda, of this Court are not to be cited as precedents."

[3] There is also substantial reason to doubt that the petition is timely. The court of appeals denied petitioners' petition for rehearing on May 23, 1990; the time limit prescribed by 28 U.S.C. 2101(c) for filing a petition for certiorari was thus August 22, 1990. That statutorily prescribed time limitation is jurisdictional. *Dep't of Banking* v. *Pink*, 317 U.S. 264, 268 (1942). Petitioners suggest their October 19, 1990, petition is nonetheless timely because it was filed within 90 days of the court of appeals' October 2, 1990, order denying rehearing. Pet. 2 & n.2. That order, however, which did not purport to determine the timeliness of any petition to this Court, Pet. App. 16a-17a, may not have tolled the time for filing a peti-

Petitioners' sole contention is that certain provisions in the Commission's cease and desist order run afoul of the First Amendment by regulating speech. Pet. 5-8. Specifically, petitioners object to provisions of the Commission's order that prohibit petitioners from conspiring to "discourage" any person from providing legal services in connection with a price-fixing boycott regarding legal services for indigent persons, or from conspiring to "[e]ncourage, suggest, advise, or induce" any person to engage in the actions prohibited by the order (principally, engaging in the very price-fixing efforts that petitioners themselves conducted). Pet. App. 4a-5a (Order, I.A and D). That attack on the breadth of the Commission's order is misguided. "Having been caught violating the Act, [petitioners] 'must expect some fencing in.'" *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 395 (1965), quoting *FTC* v. *National Lead Co.*, 352 U.S. 419, 431 (1957). As this Court explained in rejecting a First Amendment challenge to a remedial order for a price-fixing violation:

> Having found the Society guilty of a violation of the Sherman Act, the District Court was em-

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tion. Cf. *Missouri* v. *Jenkins*, 110 S. Ct. 1651, 1662 (1990) (time for filing a petition is not tolled when a lower court amends its order "solely for the purpose of extending that time"). In the alternative, petitioners move this Court to extend by 60 days the period for filing their petition. Pet. 2-3. As petitioners recognize, their application is untimely under Rule 30.2 of this Court, and the Court will not grant such an untimely application "except in the most extraordinary circumstances." In addition, we are aware of no situation in which this Court has granted an application to extend the time for filing a petition for certiorari, when the application was not filed until after the jurisdictional time limit had expired.

> powered to fashion appropriate restraints on the Society's future activities both to avoid a recurrence of the violation and to eliminate its consequences. While the resulting order may curtail the exercise of liberties that the Society might otherwise enjoy, that is a necessary and, in cases such as this, unavoidable consequence of the violation. Just as an injunction against price fixing abridges the freedom of businessmen to talk to one another about prices, so too the injunction in this case must restrict the Society's range of expression on the ethics of competitive bidding. The First Amendment does not "make it . . . impossible ever to enforce laws against agreements in restraint of trade . . . ." In fashioning a remedy, the District Court may, of course, consider the fact that its injunction may impinge upon rights that would otherwise be constitutionally protected, but those protections do not prevent it from remedying the antitrust violations.

National Society of Professional Engineers v. *United States*, 435 U.S. 679, 697-698 (1978) (citations omitted).[4] The order here is justified by the same principles—particularly in light of the fact that successful price-fixing activities by their fellow attorneys could, in some cases, provide the same benefits to petitioners that they sought by means of the unlawful conduct redressed by the order.[5]

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[4] In *National Society of Professional Engineers*, a trade association was prohibited from "adopting any official opinion, policy statement or guideline stating or implying that competitive bidding is unethical." 435 U.S. at 697. The association challenged that order as both "an unconstitutional prior restraint on speech and an unconstitutional prohibition against free association." *Id.* at 697 n.25.

[5] Petitioners are wide of the mark in suggesting that the remedial order is inconsistent with this Court's decision on

Petitioners contend (Pet. 6) that the remedial order at issue would "seriously restrict political discourse," but that assertion is based on a misperception about the character and scope of the order. The preamble to Paragraph I of the order makes abundantly clear that its strictures apply only to *concerted* efforts to incite horizontal price-fixing boycotts. Pet. App. 4a. Individual actions are not similarly constrained. Thus, if petitioner Perrotta "should become an elected official" the Commission's order will not bar him from uttering the same "words of encouragement" that petitioners believe they "received from public officials in this case." Pet. 6. Likewise, nothing in the order would prohibit any petitioner from offering his personal "advice" concerning participation in a lawyers' boycott, as did the late Dean Branton of Howard Law School. Pet. 7.

While the order therefore gives petitioners breathing space as individuals "to speak freely on an issue about which they care deeply," Pet. 8, the challenged provisions of the order are avowedly designed to prohibit petitioners from engaging in future conspiracies to incite and further the same type of horizontal price-fixing boycott as they themselves conducted in this case. As the Commission explained, the provisions at issue are "narrow[]" ones, integrally related

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the liability issues in this case. Pet. 5 & n.5. This Court did not consider the limits that may be placed on petitioners' expression as part of a remedial order. See 110 S. Ct. at 782 n.20. Nor does the decision below conflict with any of the court of appeals decisions cited by petitioners. Pet. 7 n.10. Those cases involved particular remedies for misleading commercial speech that the courts of appeals required to be more closely tailored to the scope of the violation. The Commission engaged in such tailoring here. See pp. 8-9 & n.6, *infra*.

to remedying the "law violation found to exist" and intended to sweep "no broader than necessary to prevent a recurrence of the violation." Pet. App. 8a.[6] Cf. *Brandenburg* v. *Ohio*, 395 U.S. 444, 447, 449 (1969) (per curiam) (although a statute may not proscribe "mere advocacy" of unlawful action, the government may regulate advocacy "directed to inciting or producing imminent lawless action and * * * likely to produce such action"). Consequently, the order imposes no undue burden upon the exercise of First Amendment rights by petitioners. If petitioners actually engage in activities they believe are protected by the First Amendment and the Commission contends that the order applies to such activities, there will be time enough to determine the constitutionality of the order's application, and to do so in a concrete factual setting.

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[6] More fully, the Commission explained:

> The order in this case narrowly prohibits the respondents from engaging in the conduct that we have concluded was unlawful and recognizes their right under the First Amendment to petition the government. The order requires the respondents to cease and desist from concerted refusals to provide legal representation to any government program that provides such services for indigent criminal defendants in connection with efforts to affect the level of fees paid for such representation. Paragraphs I.B, I.C and I.D of the order require the respondents to cease and desist from certain specific practices that they employed to ensure the success of their boycott. These provisions are clearly related to the law violation found to exist and no broader than necessary to prevent a recurrence of the violation.

Pet. App. 8a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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* The Solicitor General is disqualified in this case.

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